

1                                   **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**  
2                                   **EASTERN WASHINGTON REGION**  
3                                   **STATE OF WASHINGTON**

4 CONCERNED FRIENDS OF FERRY  
5 COUNTY and DAVID L. ROBINSON,

6                                   Petitioners,

7 v.

8 FERRY COUNTY,

9                                   Respondent.

**Case No. 11-1-0003**

**ORDER ON MOTION FOR SUMMARY  
JUDGMENT**

10 THIS Matter comes before the Board upon Ferry County's Motion for Summary Judgment  
11 filed on December 2, 2011 requesting that the Petition for Review be dismissed in its  
12 entirety.

13                                   **I. DISCUSSION**

14 The Growth Management Hearings Board is a creature of the Legislature, without inherent  
15 or common-law powers and, as such, may exercise only those powers conferred by statute,  
16 either expressly or by necessary implication.<sup>1</sup> As a quasi-judicial tribunal, the Board's  
17 powers are restricted to a review of those matters specifically delegated by statute.<sup>2</sup> The  
18 power of an administrative tribunal to fashion a remedy is strictly limited by statute.<sup>3</sup>

19 To invoke the Board's jurisdiction to review compliance with the Growth Management Act  
20 (GMA), a party with standing must comply with the statute's procedural requirements<sup>4</sup>:

21 \_\_\_\_\_  
22 <sup>1</sup> *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998). Administrative  
23 agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers  
24 expressly granted. *Id.* at 564.

<sup>2</sup> *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005).

<sup>3</sup> *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998).

25 <sup>4</sup> Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that  
26 a party does is invoke it. Statutory requirements must be met before jurisdiction is properly invoked. *Dougherty*  
*v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319 (2003).

- 1 a) file a petition for review that includes a detailed statement of issues presented for  
2 resolution by the Board;<sup>5</sup>  
3 b) file the petition for review within 60 days after publication by the legislative body of  
4 the county;<sup>6</sup> and  
5 c) allege that the county is not in compliance with the requirements of the GMA.<sup>7</sup>

6 The Board is authorized by statute to dismiss a petition for review if the petition is frivolous  
7 or if the Board finds that the person filing the petition lacks standing.<sup>8</sup> The Board must  
8 dismiss a petition when the Board determines it lacks jurisdiction, since the Board has no  
9 power to adjudicate that particular case.<sup>9</sup>

10 The GMHB Rules of Practice and Procedure provide that dispositive motions are permitted  
11 on a limited record “to determine the board’s jurisdiction, the standing of a petitioner, or the  
12 timeliness of the petition.”<sup>10</sup> The Board rarely entertains a motion for summary judgment  
13 except in a case of failure to act by a statutory deadline.<sup>11</sup> Accordingly, the Board will deem  
14 Ferry County’s present motion to be a dispositive motion analogous to a Rule 12(b)(6)  
15 motion to dismiss under the Superior Court Civil Rules.

16 **Petition for Review that includes a detailed statement of issues**

17 Ferry County seeks dismissal of the Petition for Review, in its entirety, and argues that  
18 Petitioners have failed to provide the “detailed statement of issues” required by RCW  
19 36.70A.290(1), WAC 242-03-210(2), and Board precedent. The County asserts that  
20 Petitioners’ issues do not specify any particular County ordinance provisions, list every  
21 conceivably applicable GMA provision, and fail to provide any explanation concerning the

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22 <sup>5</sup> RCW 36.70A.290(1).

23 <sup>6</sup> RCW 36.70A.290(2).

24 <sup>7</sup> RCW 36.70A.280(1)(a).

25 <sup>8</sup> RCW 36.70A.290(3).

26 <sup>9</sup> See *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks jurisdiction over a proceeding, it  
“may do nothing other than enter an order of dismissal”]. See also *Griffith v. City of Bellevue*, 130 Wn.2d 189,  
196 (1996).

<sup>10</sup> WAC 242-03-555(1).

<sup>11</sup> Id.

1 nature of their challenges. The County raised, for the first time in a reply brief, the specific  
2 argument that “these failures demand dismissal for lack of jurisdiction under the GMA and  
3 Board precedent.”<sup>12</sup>

4 Petitioners filed a Petition for Review (PFR) including a statement of four issues. In  
5 essence, the County claims that Petitioners’ four issue statements are not “detailed” enough  
6 to satisfy the statute, and therefore according to the County, the Board lacks jurisdiction to  
7 hear this case.

8 Each of Petitioners’ four issue statements contains specific citations to sections of RCW  
9 Chapter 36.70A. Each issue statement refers to a specific ordinance adopted by Ferry  
10 County. And, each issue statement refers to a topical area within the challenged ordinance:

11 Issue 1: “agricultural lands of long-term commercial significance”

12 Issue 2: “forest lands of long-term commercial significance”

13 Issue 3: “mineral resource lands of long-term commercial significance”

14 Issue 4: “development standards for resource lands including the setting of  
15 minimum lot sizes for agricultural lands.”

16 Ferry County has cited no case law or other authority to support their claim that these issues  
17 are so lacking in detail that the Board lacks jurisdiction. The County cites this Board’s 2008  
18 Order in *City of Wenatchee v. Chelan County*<sup>13</sup> for the proposition that greater detail is  
19 required in the issue statements. However, in the *City of Wenatchee* case the Board  
20 declined to dismiss the case and merely provided aspirational guidance on drafting issue  
21 statements.

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23 <sup>12</sup> Ferry County’s Reply in Support of Motion for Summary Judgment, page 9 (Dec. 16, 2011). The Board  
24 notes that parties should refrain from raising new arguments in reply briefs as that limits the opposing party’s  
25 opportunity to respond. Jurisdictional issues may, however, be raised at any time, including at the Hearing on  
the Merits.

26 <sup>13</sup> EWGMHB Case No. 08-1-0015, Order on Motions (Dec. 2, 2008).

1 What controls here is the statute requiring a “detailed statement of the issues.” While it may  
2 always be possible to provide even greater detail in an issue statement, there must be a  
3 balance struck between specificity and conciseness. Issue statements must give  
4 reasonable notice of the scope of the review in a single sentence but cannot present actual  
5 legal arguments as that is done through much more detailed briefing and oral argument.

6 Moreover, even if the issue statements were lacking technical details, our Supreme Court  
7 has held that public policy favors the adjudication of controversies on their merits rather than  
8 their dismissal on technical procedural grounds.<sup>14</sup> The purpose of rules of procedure is to  
9 place substance over form to the end that cases be resolved on the merits.<sup>15</sup> In some  
10 circumstances, jurisdictional requirements may be satisfied by substantial compliance,  
11 which is defined as actual compliance in respect to the substance essential to every  
12 reasonable objective of a statute.<sup>16</sup>

13 Rules adopted to regulate proceedings are not jurisdictional.<sup>17</sup> Jurisdiction does not depend  
14 on procedural rules.<sup>18</sup> Dismissal of a case for failure to comply with rules of procedure  
15 under WAC 242-03-720(2) would be warranted when that failure essentially renders the  
16 action frivolous. The County has not alleged that this PFR is frivolous, so dismissal is not  
17 warranted on that basis.

18 The Board finds that Petitioners’ four issue statements in the PFR are adequate to comply  
19 with the statutory provision for a “detailed statement of the issues.” Accordingly, the motion  
20 to dismiss on this ground must be denied.

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23 <sup>14</sup> *Crosby v. Spokane County*, 137 Wn.2d 296, 303 (1999).

24 <sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 301.

<sup>17</sup> *Griffith v. City of Bellevue*, 130 Wn.2d 189, 198 (1996).

25 <sup>18</sup> *Dougherty v. Dept. of Labor & Industries*, 150 Wn.2d 310, 315 (2003).

1 **Standing**

2 Ferry County argues as follows: (a) Petitioners lack standing with respect to forest lands  
3 [Issue 2] and mineral resource lands [Issue 3], and (b) Petitioners' challenges on these two  
4 issues should accordingly be dismissed.

5 RCW 36.70A.280(2) provides in pertinent part:

6 A petition may be filed only by: . . . (b) a person who has participated orally or in  
7 writing before the county or city regarding the matter on which a review is being  
8 requested . . .

8 RCW 36.70A.280(4) provides:

9 To establish participation standing under subsection (2)(b) of this section, a  
10 person must show that his or her participation before the county or city was  
11 reasonably related to the person's issue as presented to the board.

11 The Court of Appeals has held that the word "matter" used in RCW 36.70A.280(2) is not  
12 equivalent to the word "enactment;" rather, the word "matter" refers to "a subject or topic of  
13 concern or controversy."<sup>19</sup> Ferry County asserts that Petitioners' written comments were  
14 solely limited to addressing agricultural resource lands issues, and so the "matter" is limited  
15 to agricultural resource lands.<sup>20</sup> Petitioners respond that their "participation" consisted of  
16 two letters submitted to the County on April 16, 2011 and July 25, 2011 wherein Petitioners  
17 incorporated by reference a July 22, 2011 letter from Futurewise to Ferry County that  
18 discusses forest lands and mineral resource lands.<sup>21</sup> Essentially, Petitioners argue that the  
19 "matter" refers to Natural Resource Lands, including agriculture, forest, and mineral  
20 resource lands.

20 The Board finds that Petitioners' participation before the County (letters of April 16, 2011  
21 and July 25, 2011) was reasonably related to Issues 2 and 3 as now presented to the Board  
22 for the following reasons:

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24 <sup>19</sup> *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 672-673 (2000).

25 <sup>20</sup> Ferry County's Motion for Summary Judgment, pages 5-6 (Dec. 2, 2011).

26 <sup>21</sup> Response to Summary Judgment Motion, pages 5-6 (Dec. 12, 2011).

- Under the GMA, Natural Resource Lands designations include agricultural, forest, and mineral resource lands. The GMA treats these three types of resource lands as distinct but related designations under RCW 36.70A.170. It is possible for two or more natural resource designations to apply to the same land.<sup>22</sup>
- RCW 36.70A.060 requires counties to adopt development regulations to “assure the conservation of agricultural, forest, and natural resource lands designated under RCW 36.70A.170.” The three types of resource lands are treated as distinct but related for purposes of conserving resource lands.<sup>23</sup>
- Ferry County recognizes the relationship between these three types of resource lands by adopting some common natural resource policies for agricultural, forest, and mineral resource lands in Ordinance #2011-04, Section 7.4.30.<sup>24</sup>
- Petitioners referenced “Section 7.4.30, Natural Resource Policies” in their July 25, 2011 letter to Ferry County, as well as referring to the “Designated Resource Lands” table in the draft ordinance.<sup>25</sup>
- Petitioners, in their April 16, 2011 and July 25, 2011 comment letters, incorporated by reference a July 22, 2011 letter from Futurewise to Ferry County that discusses forest lands and mineral resource lands issues.<sup>26</sup>
- These three comment letters provided reasonable notice to the County that there were concerns about the designation and conservation of all three types of resource lands in Ferry County.

<sup>22</sup> WAC 365-190-040(7) [“Overlapping designations”].

<sup>23</sup> See WAC 365-196-815.

<sup>24</sup> Declaration of Brian D. Amsbary in Support of Ferry County’s Motion for Summary Judgment, Exhibit 3 (Dec. 2, 2011).

<sup>25</sup> Declaration of Brian D. Amsbary in Support of Ferry County’s Motion for Summary Judgment, Exhibit 5, pages 1-2 (Dec. 2, 2011).

<sup>26</sup> Declaration of Brian D. Amsbary in Support of Ferry County’s Motion for Summary Judgment, Exhibits 4 and 5 (Dec. 2, 2011).

Therefore, the Board finds and determines that Petitioners have standing with respect to agricultural lands, forest lands, and mineral resource lands. The motion to dismiss based on standing is denied.

### **Forest and Mineral Resource Lands – Issues 2 and 3**

Ferry County alleges that provisions pertaining to forest and mineral lands cannot be challenged because they were not substantively amended. However, in adopting Ordinance No. 2011-04, Ferry County appears to have made some changes to Comprehensive Plan policies regarding designating Forest Lands and Mineral Resource Lands.<sup>27</sup> Petitioners may present legal briefing and arguments at the Hearing on the Merits as to Issues 2 and 3 so long as those arguments are limited to the amendments adopted in Ferry County Ordinance No. 2011-04 related to the subject of designating forest lands and mineral resource lands and the Future Land Use Map as amended. The motion to dismiss Issues 2 and 3 is denied.

### **Agricultural Lands**

Ferry County argues that Petitioners cannot challenge agricultural lands provisions in this case that have previously been litigated in prior Case No. 01-1-0019.

On December 16, 2011, the Board issued its Eighth Compliance Order for Ferry County on Agricultural Resource Lands in Case No. 01-1-0019. In that prior case, the Board decided a challenge to Ferry County Ordinance Nos. 2011-03 and 2011-04. The issues decided in the December 16, 2011 Eighth Compliance Order involved (a) the designation of Agricultural Lands of Long-Term Commercial Significance under RCW 36.70A.170 and RCW 36.70A.030, and (b) the Notice of Designated Agricultural Resource Lands under RCW 36.70A.060(1)(b). Issue 1 in the present case presents the same issue that was decided in the prior case.

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<sup>27</sup> Declaration of Brian D. Amsbary in Support of Ferry County's Motion for Summary Judgment, Exhibit 2 (Dec. 2, 2011) [5/16/11 Draft Comp Plan Changes, including underlined language relating to Natural Resources Policies for agricultural, forest, and mineral resource lands].

1 The Growth Management Hearings Board has implied statutory authority to apply the  
2 equitable doctrines of res judicata and collateral estoppel to preclude relitigation of claims or  
3 issues that were or could have been raised and adjudicated in prior proceedings before the  
4 board.<sup>28</sup> Collateral estoppel, or issue preclusion, requires (1) identical issues, (2) a final  
5 judgment on the merits, (3) the party against whom the plea is asserted must have been a  
6 party to or in privity with a party to the prior adjudication, and (4) application of the doctrine  
7 must not work an injustice on the party against whom the doctrine is to be applied. For  
8 collateral estoppel to apply, the issue to be precluded must have been actually litigated and  
necessarily determined in a prior action.<sup>29</sup>

9 Collateral Estoppel applies here because the same parties litigated in prior Case No. 01-1-  
10 0019 the issues of designating Agricultural Lands of Long-Term Commercial Significance  
11 and Notice of Designated Agricultural Resource Lands. Those issues were actually litigated  
12 and necessarily determined in the prior case. Application of Collateral Estoppel will not  
13 work an injustice on the Petitioners here since they have already had a full opportunity in  
14 the prior case to litigate the issues on agricultural lands designations. In contrast to  
15 “designation,” the RCW 36.70A.060(1) provision to adopt development regulations to assure  
16 the “conservation” of natural resource lands was not actually litigated and necessarily  
determined in Case No. 01-1-0019 (Eighth Compliance Order, Dec. 16, 2011).

17 Therefore, Petitioners in the present case cannot present any legal briefing or arguments at  
18 the Hearing on the Merits on issues that were previously litigated and determined in  
19 EWGMHB Case No. 01-1-0019 (Eighth Compliance Order, Dec. 16, 2011). Petitioners  
20 cannot present any legal briefing or arguments on the issues of “designating” Agricultural  
21 Lands of Long-Term Commercial Significance and Notice of Designated Agricultural  
22 Resource Lands. Petitioners may, however, present legal briefing and arguments limited to  
23 the subject of “adequate Policies and development standards for resource lands including

24 <sup>28</sup> *Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Board*, 163  
25 *Wn. App.* 513, 528 (2011).

<sup>29</sup> *Id.* at 524.



the setting of minimum lot sizes for agricultural lands in Ferry County Ordinance No. 2011-04 and Ferry County Ordinance No. 2011-03,” as presented in Petitioners’ Issue 4. Issue 1 must be dismissed.

## II. ORDER

Based on the foregoing, the County’s motion is hereby GRANTED in part and DENIED in part as follows:

- Issue 1: Issue 1 is dismissed.
- Issues 2 and 3: Petitioners may present legal briefing and arguments at the Hearing on the Merits on Issues 2 and 3 so long as those arguments are limited to the amendments adopted in Ferry County Ordinance No. 2011-04 related to the subject of designating forest lands and mineral resource lands and the Future Land Use Map as amended.
- Issue 4: Petitioners cannot present any legal briefing or arguments on the issues of “designating” Agricultural Lands of Long-Term Commercial Significance and Notice of Designated Agricultural Resource Lands. Petitioners may, however, present legal briefing and arguments limited to the subject of “adequate Policies and development standards for resource lands including the setting of minimum lot sizes for agricultural lands in Ferry County Ordinance No. 2011-04 and Ferry County Ordinance No. 2011-03,” as presented in Petitioners’ Issue 4.

Entered this 23<sup>rd</sup> day of December, 2011.

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Raymond L. Paoella, Board Member

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Joyce Mulliken, Board Member

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Margaret Pageler, Board Member